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NTSB Order No. EA-4308

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 14th day of December, 1994

E. WILLIAM SWAN, Applicant, v. DAVID R. HINSON, Administrator, Federal Aviation Administration, Respondent.	Docket 183-EAJA-SE-12815

OPINION AND ORDER

The Administrator has appealed from the initial decision of Administrative Law Judge Patrick G. Geraghty, served November 5, 1993, granting applicant's application for attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. 504.[1] For the reasons discussed below, the Administrator's appeal is denied and the law judge's award, as

[1] A copy of the initial decision is attached.

supplemented by applicant's subsequently-incurred and documented additional fees and expenses,[2] is affirmed.

Background

This EAJA claim arises from an enforcement action in which the Administrator sought to suspend applicant's commercial pilot certificate for 180 days, based on his operation of a Piper PA-24-250 aircraft, of which he was at the time a part owner, when it was unairworthy due to improper or absent documentation of three alterations which had been made to the aircraft, and when it was not in compliance with two airworthiness directives. Specifically, it was alleged (and ultimately proven) that 1) FAA Form 337s[3] documenting the installation of a ski storage tube and modification of the instrument panel were inadequate in that they had not been properly approved by the FAA; 2) there was no Form 337 documenting the replacement of the originally-installed two-light landing gear indicator with a three-light indicator; 3) the aircraft was out of compliance with Airworthiness Directive 77-13-21 (requiring replacement of the landing gear bungee cords at least every three years), in that the last record of compliance was on August 23, 1979; and 4) the aircraft was out of compliance with AD 85-14-10 R2 (requiring replacement, followed by periodic inspection, of all propeller blade clamp assemblies) in that

[2] In total, applicant is seeking $7,304.31 in fees and expenses. The Administrator has not contested this amount.

[3] For certain major repairs and alterations, a Form 337, signed by the mechanic who performed the work, must be submitted to the FAA and a copy provided to the aircraft owner. See 14 C.F.R. Part 43, Appendix A and B.

there was no record of the required magnetic particle inspection.

It was alleged that, as a result of applicant's operation of the aircraft when these deficiencies existed, he violated 14 C.F.R. 91.7(a) and 39.3.[4]

Applicant's position throughout this proceeding has been that he justifiably relied on the aircraft mechanics who worked on the aircraft (George and Robert Mace)[5] to properly prepare the required Form 337s, and that he also reasonably relied on mechanic Robert Mace's entry in the aircraft log certifying the aircraft's airworthiness at the completion of an annual inspection, which was signed just two weeks before the cross-country trip which led to these charges.[6] Applicant also

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[4] **§ 91.7 Civil aircraft airworthiness.**

(a) No person may operate a civil aircraft unless it is in an airworthy condition.

§ 39.3 General.

No person may operate a product to which an airworthiness directive applies except in accordance with the requirements of that airworthiness directive.

[5] During 1989 and 1990, applicant apparently relied on George Mace, then the holder of a mechanic certificate and an Inspection Authorization (IA), for all of his aircraft maintenance and inspection needs, including a pre-purchase inspection of the aircraft. George Mace's mechanic certificate and IA were revoked on an emergency basis in 1990. See Administrator v. Mace, NTSB Order No. EA-3195 (1990), Order Dismissing Appeal. His son, Robert Mace (also the holder of a mechanic certificate and an IA), signed off on the 1991 annual inspection, although it appears from the record that his father assisted him with the work. Robert Mace's mechanic certificate and IA were suspended as a result of this incident. (Tr. 55.)

[6] The maintenance deficiencies here at issue were discovered when an FAA inspector -- who was initially called to investigate

indicated that when he purchased the aircraft in 1989, he relied on the assurance of mechanic George Mace that it was then in compliance with all applicable ADs.

At the hearing, applicant indicated that he knew Form 337s were required for the modifications here at issue, but that he relied on the mechanics to prepare them in accordance with FAA standards.[7] However, it was established that no Form 337 was submitted to the FAA for the landing-gear indicator, and the Form 337s documenting the ski-tube installation and reorganized control panel were inadequate because, although they made reference to (and attached approved Form 337s relating to) similar modifications to other Piper PA24-250 aircraft, those modifications were not field-approved by the FAA for this particular aircraft.[8] A stamp appearing in a block labeled "For FAA Use Only" on the earlier-approved Form 337s for the other aircraft indicated that the alteration was approved only for that specific aircraft. According to applicant, he did not see the Form 337s prepared for his aircraft until some two weeks after they were prepared, when he retrieved them from Robert Mace in

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applicant's apparent gear-up landing (later determined to be due to a collapsed landing gear) at the conclusion of that trip -- noted the three modifications to the aircraft and asked applicant to produce the aircraft records.

[7] The reconfigured instrument panel and the new landing gear indicator were apparently installed at the time of the 1991 annual inspection (signed off 3/17/91). The ski-tube was installed prior to applicant's purchase of the aircraft, but a Form 337 was apparently not prepared at that time.

[8] There is no indication in the record that the FAA would not have approved the modifications for this particular aircraft.

response to the FAA's request for records in connection with its investigation.

After hearing the evidence in this case, the law judge concluded that the aircraft was unairworthy due to the inadequate Form 337s, and the fact that the cited ADs were overdue, but held that there was insufficient evidence to show that applicant was in any way responsible for, or had knowledge of, those deficiencies. He held that applicant reasonably relied on the mechanic's certification of airworthiness, and on the assurance that the required Form 337s had been properly completed. He found no evidence that applicant had any prior knowledge of what sort of data is necessary for a Form 337, or that he was on notice that he was operating an unairworthy aircraft. Thus, the law judge dismissed the complaint. This EAJA claim followed.

Applicant's EAJA claim

The EAJA requires the government to pay to a prevailing party certain attorney fees and costs unless the government establishes that its position was substantially justified, or that special circumstances would make an award of fees unjust. 5 U.S.C. 504(a)(1). To find that the Administrator was substantially justified, we must find his position reasonable in fact and law, i.e., that the legal theory propounded is reasonable, the facts alleged have a reasonable basis in truth, and the facts alleged will reasonably support the legal theory. Application of U.S. Jet, NTSB Order No. EA-3817 at 2 (1993); Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct. 2541 (1988).

While this standard is less stringent than that applied at the merits phase of the proceeding, where the Administrator must prove his case by a preponderance of the reliable, probative, and substantial evidence,[9] the legislative history of the EAJA makes clear that it was "intended to caution agencies to carefully evaluate their case and not pursue those which are weak or tenuous." See Administrator v. Catskill Airways, 4 NTSB 799, 800 (1983), quoting 5 U.S. Cong. News 1980, at 4993.

In granting the application for EAJA fees, the law judge again noted that there was no factual basis on which to conclude that applicant "had any reason or duty to go behind the representations made by the individual who performed the work, inspected the aircraft and had returned it to service." (Initial decision at 2.) He further noted that the Administrator knew, prior to initiating this action, that there was no factual basis for the charges, and cited to a "Record of Informal Conference," prepared by the FAA attorney who conducted the conference (not the same attorney who eventually tried the case and now opposes the grant of EAJA fees) after meeting with applicant and his attorney.[10] Both the attorney and the FAA inspector present at

[9] Accordingly, the FAA's failure to prevail on the merits does not preclude a finding that its position was nonetheless substantially justified under the EAJA. See Application of U.S. Jet at 3; Federal Election Commission v. Rose, 806 F.2d 1081, 1087 (D.C. Cir. 1986).

[10] Although the law judge states that this document was submitted by applicant in support of his EAJA claim, it appears from the record that it was actually submitted by the Administrator, in support of his opposition to applicant's EAJA claim. Current FAA counsel takes the position that applicant

that conference (not the same inspector who testified at the hearing), concluded "that there is no compelling evidence in the file which suggests [applicant] had actual knowledge of the Form 337 deficiencies and overdue ADs [and that] without such evidence, it would appear that [applicant's] reliance on Mace's . . . representations was both justified and reasonable." Accordingly, the FAA attorney recommended that the notice of proposed certificate action against applicant be withdrawn, absent "other evidence . . . that rebuts [applicant's] assertions."

Noting that no evidence was apparently developed to rebut applicant's assertions (as none was produced at the hearing), the law judge concluded that the Administrator was not substantially justified in fact in pursuing this action against applicant and that, as FAA counsel recognized after the informal conference, the Administrator's case was weak and tenuous. We agree.

In appealing the law judge's EAJA award, the Administrator asserts that he was justified in assuming that applicant had actual or constructive knowledge of the defective Form 337s and the AD noncompliance because: 1) applicant was a part-owner of the aircraft; 2) applicant performed "much of the maintenance" underlying the defective Form 337s; 3) applicant is a certified

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admitted during the conference (which was attended by a different FAA attorney) that he had concerns about the adequacy of the Form 337s prepared by mechanic Robert Mace. However, no such admission is apparent from reading the document. In fact, the clear implication of applicant's statements at the conference, as reported by the FAA attorney who attended the conference and prepared the document, is to the contrary.

flight instructor; 4) applicant "expressed concern about the adequacy" of the Form 337s here at issue; and 5) the aircraft's unairworthiness was readily apparent from "documentation which was readily available to [applicant], which required no special training to interpret." However, contrary to the Administrator's reasoning, these asserted factors are insufficient to justify a conclusion that applicant knew or should have known of the maintenance deficiencies here at issue.

While we do not disagree with the Administrator's assertion that "a pilot who owns the aircraft he flies should be expected to know more about its mechanical condition than a pilot who flies an aircraft owned by someone else" (App. Br. at 4), it does not follow that applicant (who is not an aircraft mechanic) should have been expected to search out and recognize technical deficiencies in the Form 337s which were prepared by a properly certificated aircraft mechanic/IA, or to research the aircraft's entire AD history in order to ensure a complete record of compliance. Our case law makes clear that "the standard for accountability under the regulation [prohibiting operation of an unairworthy aircraft] is whether a reasonable and prudent pilot would have concluded that a specific condition rendered a craft unairworthy, not whether an aviation mechanic would have so concluded."[11] Thus, contrary to the Administrator's assertion

[11] Administrator v. Parker, 3 NTSB 3005 (1981), Order Denying Reconsideration. See also Administrator v. Parker, 3 NTSB 2997, 2998 n. 6 (1980); and Crittenden v. Administrator, NTSB Order No. EA-3968 at 9 (1993).

that he "had no burden to prove notice at all," we think that -- especially in light of applicant's stated position at the informal conference that he relied on the mechanics to properly do their jobs -- the Administrator was obligated to introduce some evidence, either direct or circumstantial, that applicant had reason to conclude his aircraft was unairworthy. This he did not do.

The Administrator's assertion that he had no information contradicting his assumption (that applicant knew of the deficient maintenance documents), is especially surprising in light of the existence of the "Record of Informal Conference" clearly indicating applicant's asserted reliance on the aircraft mechanics' certification of AD compliance, and their assurances that the paperwork documenting the aircraft modifications had been properly completed. There is absolutely no basis in the record for the Administrator's repeated assertions that applicant "expressed concern" about the Form 337s, and that he gave the impression at the informal conference that he was, in fact, aware of his aircraft's documentary deficiencies. The Administrator appears to equate applicant's admitted awareness that Form 337s were required and his desire to comply with FAA requirements, with an admission that he knew the Form 337s ultimately prepared were inadequate.[12] However, no such conclusion is warranted in

[12] In that regard, we note that, even if applicant had seen the forms prior to operating the aircraft (which the law judge found he had not), we do not agree with the Administrator that those forms "unambiguously indicated" that the aircraft was unairworthy. To the contrary, we think it would not be

this case.

We reject the Administrator's assertion that applicant should be held to have had knowledge of the deficient paperwork because he "performed much of the maintenance which led to this case himself." While applicant acknowledged, both at the informal conference and at the hearing, that he assisted with the installation of the reconfigured instrument panel (in order to save money), there is no indication that he participated in any other maintenance or, more importantly, that he assisted in preparing any of the supporting paperwork. Thus, there is no basis for the Administrator's conclusion that applicant's involvement in the maintenance implies that "he was on notice regarding the invalidity of the Form 337 and/or the [a]irworthiness noncompliance."

Finally, we are entirely unconvinced that applicant's status as a certified flight instructor (CFI) justifies an assumption that he had knowledge of the deficiencies here at issue.

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unreasonable for a non-mechanic owner to believe that a mechanic/IA could obtain FAA approval of the modifications described therein based on technical documentation and a field approval granted to another aircraft of the same make and model.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied;

2. The law judge's award of EAJA fees and expenses, as supplemented by applicant's subsequent filing, is affirmed; and

3. The Administrator is to pay applicant a total of $7,304.31.

HALL, Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.